Supreme Court, U.S.
FILED
NOV 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-6461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EARLINE MARTIN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Writ Of Certiorari To
The Ohio Supreme Court

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Argument	1
I. SELF-DEFENSE NECESSARILY NEGATES ELEMENTS OF THE CRIME OF AGGRAVATED MURDER IN OHIO, AND THE STATE'S ATTEMPT TO LABEL THIS AS AN "AFFIRMATIVE DEFENSE" PROVIDES NO ANALYTICAL ASSISTANCE TO THIS COURT	3
II. WHEN A FACT ALTOGETHER EXCULPATES THE ACCUSED FROM ANY STIGMA AND PUNISHMENT, AND THE ACT IS HISTORICALLY RECOGNIZED BY ALL TO BE WHOLLY INNOCENT AND ABSENT OF CRIMINAL WRONGDOING, THEN THE STATE MUST BEAR THE BURDEN OF PROOF ON THAT ISSUE	21
III. THE STATE HAS EXCEEDED THE CONSTITUTIONAL LIMITS IN DEFINING ITS CRIMES, AS SELF-DEFENSE IS A CONSTITUTIONALLY PROTECTED RIGHT, OR CONDUCT FOR WHICH A DEFENDANT CANNOT CONSTITUTIONALLY BE PUNISHED	28
Conclusion	45
Appendix	RA-1

TABLE OF AUTHORITIES

Cases:	Page
Ballew v. Georgia, 435 U.S. 223 (1978)	44
Chan Kau v. The Queen, [1955] A.C. 206	11
Commonwealth v. York, 50 Mass. (9 Metc.) 93 (1845)	11
Doe v. United States, 465 U.S. 605 (1984)	39
Erwin v. State, 29 Ohio St. 186 (1876)	23
Fletcher v. Weir, 455 U.S. 603 (1982)	26
Freedman v. Maryland, 380 U.S. 51 (1965)	38
Griffin v. Martin, 785 F.2d 1172, opin. withdrawn on reh. en banc, 795 F.2d 22 (4th Cir. 1986)	31
Griswold v. Connecticut, 381 U.S. 479 (1965)	38
Healy v. James, 408 U.S. 169 (1972)	38
In re Winship, 397 U.S. 358 (1970)	25, 36, 41
Jenkins v. Anderson, 447 U.S. 231 (1980)	26
Jones v. United States, 463 U.S. 354 (1983)	4, 16, 17, 19
King v. Oneby, 2 Ld. Raym. 1485, 92	

Page

Eng. Rept. 465 (K.B. 1727) . . . 11

Lambert v. California, 355 U.S. 225 (1957) 38, 42

Lego v. Twomey, 404 U.S. 477 (1977) 40

Leland v. Oregon, 343 U.S. 790 (1952) 15, 16

McMillan v. Pennsylvania, ___ U.S. ___, 106 S.Ct. 2411, 91 L.E.2d 67 (1986) . . . . . passim

Mullaney v. Wilbur, 421 U.S. 684 (1975) . . . . . passim

Nix v. Whiteside, ___ U.S. ___, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) 26

Patterson v. New York, 432 U.S. 197 (1977) . . . . . passim

Powell v. Texas, 392 U.S. 514 (1968) 38, 42

Rivera v. Delaware, 429 U.S. 877 (1976) 15

Shelton v. Tucker, 394 U.S. 479 (1960) 41

Silvus v. State, 22 Ohio St. 90 (1871) 9, 10, 11

Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) 27

Speiser v. Randall, 357 U.S. 513 (1958) 25, 38, 41

State v. Cotton, 56 Ohio St.2d 8,

Page

381 N.E.2d 186 (1978) 6

State v. Melchior, 56 Ohio St.2d 15, 381 N.E.2d 195 (1978) 23, 24

State v. Morris, 8 Ohio App.3d 13, 455 N.E.2d 1352, 8 O.B.R. 13 (1982) 8, 13

State v. Poole, 33 Ohio St.2d 18, 294 N.E.2d 888 (1973) 8, 9, 10

Talley v. California, 362 U.S. 60 (1960) 38

Ulster County Court v. Allen, 422 U.S. 140 (1979) 24

United States v. Bailey, 444 U.S. 394 (1980) 24

United States v. Grayson, 438 U.S. 41 (1978) 27

White v. Arn, 788 F.2d 338 (6th Cir. 1986) 30

Williams v. Florida, 399 U.S. 78 (1970) 26

Woolmington v. The Director of Public Prosecutions, [1935] A.C. 462 . . . . . 10, 11

Constitutional Provisions

United States Constitution, Amendment V 40

United States Constitution, Amendment VIII 38

United States Constitution, Amendment XIV . . . . . passim

Page

Constitution of Pennsylvania, August 16, 1776 33

Constitution of Virginia, June 12, 1776 . . . . . 5, 33

Statutory Provisions

Ohio Revised Code, Section 2901.05 . . . . . 12, 15

Ohio Revised Code, Section 2905.04 14

Ohio Revised Code, Section 2907.31 14

Ohio Revised Code, Section 2907.32 14

Ohio Revised Code, Section 2907.321 14

Ohio Revised Code, Section 2907.323 14

Ohio Revised Code, Section 2909.05 14

Ohio Revised Code, Section 2919.01 14

Ohio Revised Code, Section 2919.21 14

Ohio Revised Code, Section 2919.23 14

Ohio Revised Code, Section 2921.21 14

Page

Ohio Revised Code, Section 2921.34 14

Ohio Revised Code, Section 2921.36 14

Ohio Revised Code, Section 2921.51 14

Ohio Revised Code, Section 2923.02 14

Ohio Revised Code, Section 2923.03 14

Ohio Revised Code, Section 2925.14 14

Miscellaneous

Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 34

Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880 (1968) 12, 18

Foster, Foster's Crown Law, p. 255 (1762) 10, 11

O.W. Holmes, Jr., The Common Law, pp. 49-50 (1881) 31

Kant, Metaphysics of Ethics, 258 (Semple transl. 1836)) . . . 5

LaFave & Scott, Criminal Law, sec. 4.1, p. 304 (2d ed. 1986) . . 19

Page

Mill, On Liberty (1806) [reprinted in Wigmore, Rational Basis of Legal Institutions, p. 15 (1969)] 5

Perry, Sources of Our Liberties, p. 311, 328-329 (1978) 5, 33

Universal Declaration of Human Rights 34

REPLY BRIEF OF PETITIONER

Throughout its Brief, the State portrays self-defense as an affirmative defense, as though that terminology was some magic talisman permitting the State to shift the burden of proof as it pleased. However, while the label "affirmative defense" may evidence the State's intent to shift the burden of proof, it has no meaning in the appropriate analysis of this issue. Since **Mullaney v. Wilbur**, 421 U.S. 684 (1975), **Patterson v. New York**, 432 U.S. 197 (1977), and **McMillan v. Pennsylvania**, ___ U.S. ___, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), this Court has made clear that it will segment what may have historically been called affirmative defenses into those on which the State can oblige the defendant to bear a burden of proof, and those on which the State cannot. Labels nothwithstanding, the relevant questions are only

three: (1) whether, under a functional analysis of the state's definition of elements, one or more elements are necessarily negated by the defense interposed, Brief of Petitioner, at 31-32, **Amicus Curiae Brief**, at 17-23; or (2) whether the issue is one which historically has made a significant difference in punishment and stigma, when evaluating exculpating, as opposed to merely mitigating, issues, **Brief of Petitioner**, at 25-26; or (3) whether the defense identifies constitutionally protected conduct, or conduct that cannot constitutionally be punished, **Brief of Petitioner**, at 10-11, 24-33, **Amicus Curiae Brief**, at 4-14.

Under any of those inquiries, Earline Martin is entitled to a new trial. Self-defense negates an element of aggravated murder in Ohio. Alternatively, as self-defense historically has signified wholly innocent conduct, the burden of proof may not be placed on Petitioner. Lastly, as an

act in self-defense is constitutionally protected conduct, or conduct which cannot constitutionally be made criminal, self-defense necessarily negates a constitutionally necessary element.

I. SELF-DEFENSE NECESSARILY NEGATES ELEMENTS OF THE CRIME OF AGGRAVATED MURDER IN OHIO, AND THE STATE'S ATTEMPT TO LABEL THIS AS AN "AFFIRMATIVE DEFENSE" PROVIDES NO ANALYTICAL ASSISTANCE TO THIS COURT

A. Self-Defense Necessarily Negates The Elements of Aggravated Murder

The State's argument that self-defense negates no elements of the crime leaves the Petitioner at times bewildered, as it appears to at some points concede the issue, and at others begs the question. At page 12 in the Brief of Respondent, the State argues that "by asserting self-defense, an accused does not necessarily admit the elements of the crime, [r]ather, an accused admits doing the act . . ." This appears to be totally inconsistent with the legal formalism approach of the state and federal

authorities at other points relied on by the State, which claim (without any analysis of the elements' relation to self-defense) that the accused asserting self-defense has admitted all the statutory elements of the crime and is asserting a separate issue. In effect, the State has admitted that self-defense admits only the act, but not the crime, and that the defense negates some (as yet unidentified, formal or informal) element(s) of the crime (but not the act element). At page 11 of the Brief of Respondent, the State calls self-defense a "justification for otherwise illegal conduct." The State, here too, implicitly admits that self-defense negates the crime, as it concedes that an act in self-defense is legal conduct. Indeed, the State would be hard-pressed to argue that self-defense does not negate the crime. "A criminal act by definition is not 'within a range of conduct that is generally acceptable.'" Jones v. United States, 463 U.S.

354, 367 (1983), quoting Addington v. Texas, 441 U.S. 418, 426-427 (1979). Acts in self-defense are not condemned by society.[1]

The State offers no authority as it grasps to answer the Petitioner's compelling argument that self-defense negates the elements of prior calculation and design.

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[1] The social acceptance of acts in self-defense likely stems from several philosophical views. One is the self-preservation instinct, e.g. that "the first if not chiefest duty incumbent upon mankind in respect of his brute nature, is his conservation in his animal state." Kant, Metaphysics of Ethics 258 [Semple transl. 1836]. Another related view is that self-sacrifice to unlawful aggression should not be expected from the individual. The last is perhaps that the individual engaged in self-defense acts as an arm of the state, the latter being unable to intervene. In this view, the exercise of self-defense is an anticipated exception to the social contract between the individual and the state. Self-defense has thus been termed one of the "inherent rights, which when [men] enter into a state of society, they cannot, by any compact, deprive or divest their posterity". Constitution of Virginia, June 12, 1776. Perry, Sources of Our Liberties, at 311. See also Mill, On Liberty (1806), reprinted in Wigmore, Rational Basis of Legal Institutions, p. 15 (1969).

All the State can muster is a hypothetical. But that hypothetical amply demonstrates the State's misconception of the issue before this Court. At page 16 of the Brief of Respondent, the State contends that under the facts of its hypothetical,

> ". . . the accused may well have acted with prior calculation and design or killed in self defense. Again, these separate factual determinations are matters for the jury['s] consideration. In the present case, the question whether or not Petitioner acted with prior calculation or design or killed in self-defense was for the jury to resolve." Accord, Brief of Respondent, at 21.

This is, of course, the Petitioner's point -- the jury could not simultaneously find the defendant in the hypothetical, and/or Earline Martin, acted with both prior calculation and design and in self-defense. The two cannot coexist. See State v. Cotton, 56 Ohio St.2d 8, 381 N.E.2d 186 (1978), Brief of Amicus Curiae, at 43-50. The jury is certainly expected "to resolve" this question, but to do so, it must receive constitutionally accurate

instructions on the burden of proof as to these issues. Since the two issues necessarily negate one another, the jury must be told that the burden to prove the absence of self-defense is on the State. See Brief of Petitioner, at 5, and Brief of Amicus Curiae, at 50-55. That omission requires reversal in this case.

It is most revealing that the State relies almost wholly on Sixth Circuit cases to argue that self-defense negates no elements of Ohio crimes, as it demonstrates the lack of Ohio authority analyzing the elements of crimes and their relationship to self-defense.[2]

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[2] Due to the dearth of Ohio authority contrary to Petitioner's position, the Sixth Circuit is in no better position than this Court to determine the issue. Therefore, it would be inappropriate to defer to the Sixth Circuit's "interpretation" of Ohio law, particularly when it is contrary to the plain meaning of the statutes, Legislative Service Commission Notes, jury instruction language, and case law, as here.

The State relies on State v. Morris, 8 Ohio App.3d 12 (1982), see Brief of Respondent, at 18, 20. However, the Morris court considered only the element of unlawfully, and simply rejected its existence due to its absence from the statute defining felonious assault, and on policy grounds of avoiding limitations on the shifting of other burdens of proof to the defendant. Morris, at 18-19. The Morris case provides no significant support for the State's position as it dealt only with that element, and did so without performing the functional analysis required by Mullaney and Patterson. See Amicus Curiae Brief, at 17-23. Morris thus seems to be grounded more in an unwillingness to examine the issue of unlawfully due to the belief that a favorable ruling would undoubtedly impact on other defenses, rather than in any examination of Ohio precedent.

Although the court below and the Respondent tout State v. Poole as grounds

for viewing self-defense as a confession and avoidance, See Joint App., at 39, Brief of Respondent, at 11, the Poole court merely relied on what are now clearly unconstitutional presumptions arising from the homicide, see State v. Poole, 33 Ohio St.2d 18, 19, n.3, 294 N.E.2d 888 (1973), relying on Silvus v. State, 22 Ohio St. 90, 99-100 (1871). Silvus is significant as it is the first Ohio case dealing with the burden of proof as to self-defense, and as it placed the burden of proof on the defendant by presuming the existence of the unlawfulness element from the act of causing the death of another. Silvus, at 99-100, and see Amicus Curiae Brief, at 32-36. The Defendant Silvus had argued for an instruction that the State must prove the killing was unlawful, but the Ohio court refused, stating this instruction "would destroy the presumptions arising from the homicide". Silvus, at 92, and 99-100.

This clearly unconstitutional presump-

tion has not been abandoned, as the court below has simply maintained the consequence of the presumption, by viewing self-defense as a confession and avoidance. See Joint App., at 39, citing Poole, which at 19, n.3, in turn cites to Silvus. Thus, Ohio courts continue to make use of the benefits of this presumption, although none wish to acknowledge its existence, perhaps as they are aware of its many consititutional deficiencies.

While Ohio clings to a notion that the common law permitted the burden to be properly shifted to the defendant as this was viewed as a confession and avoidance, the very jurisdiction in which the common law developed has repudiated that notion. In Woolmington v. The Director of Public Prosecutions, [1935] A.C. 462, 473-482, the House of Lords condemned Foster's Crown Law (1762), p. 255, which had allocated to the defendant the burden of proof as to provocation, as an incorrect statement of

the common law. Later, that same body held the Woolmington decision demanded the prosecution bear the burden as to self-defense, stating it was "clear that the [common law] rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity, which is not strictly a defense." Chan Kau v. The Queen, [1955] A.C. 206. It was Foster's Crown Law which had formed the basis for the decision of King v. Oneby, 2 Ld. Raym. 1485, 92 Eng. Rept. 465 (K.B. 1727) and for the later decision of Commonwealth v. York, 50 Mass. (9 Metc.) 93 (1845). The Ohio Supreme Court relied on all of these repudiated authorities in Silvus, at 99-100.

In essence, no support is available for the State's version of the impact a claim of self-defense has on the elements of crimes.[3]

In conclusion, the State's attempts to

argue that R.C. 2901.05 can properly burden the defendant as this is an "affirmative defense" are simply inadequate. That label has no meaning. Further, the argument that this is a confession and avoidance is fallacious and evasive, as this burden was not initially shifted to the Ohio defendant because it was a confession and avoidance, but rather because it explicitly challenged the existence of an element of the crime, and the state courts did not wish to burden the prosecution with the proof of the issue. Mere conclusory and unsupportable allegations now by the Court below and the State that the issue is one of confession and avoidance, without even bothering with a functional analysis of the elements of Ohio crimes, should not sway this Court.

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[3] See also Mullaney,, at 693-696, and generally Fletcher, Two Kind of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880, 899-910 (1968).

B. Recognition That Self-Defense Negates the Elements of Ohio Crimes Will Have No Impact on Other Defenses

The State seems to rely heavily on the view expressed in **Morris** that a favorable decision for Petitioner would signal the demise of other burdens shifted to the defendant. See **Brief of Respondent**, at 21, and generally 27-32. Even assuming that states generally have the flexibility to define a crime without exempting acts done in self-defense (which the Petitioner certainly rejects, see below), this Court is presented here only with the question of whether self-defense negates Ohio elements, and should evaluate that question in a fair and unencumbered manner. The fact that Ohio courts do not wish to acknowlege elements, and thereby seek to evade the demands of due process as to this and other defenses, cannot be condoned by this Court. **Mullaney**, at 691, n.11.

Furthermore, a conclusion in Petiti-

tioner's favor would not undermine the placement of the burden of proof as to other defenses. In Ohio, some burdens are shifted by means or legislative provision.[4] None of these affirmative defenses involve self-defense.

Further, as none of these defenses appear to negate elements of the crimes as presently defined, or as necessarily defined by the constitution, this Court's reaffirmation of that analytical approach would have no impact.[5]

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[4] These defenses include those in R.C. 2907.32 (pandering obcenity), R.C.2907.31 (disseminating matter harmful to juveniles), R.C. .2907.321 - .323, R.C. 2919.01 (bigamy), R.C. 2919.21 (non-support of dependents), R.C. 2919.23 (interference with custody), R.C.2921.21 (compounding a crime), R.C. 2921.34 (escape), R.C. 2921.36 (illegal conveyance of weapons), R.C. 2921.51 (impersonating a police officer), R.C. 2923.02 (attempt), R.C.2923.03 (complicity), R.C. 2925.14 (selling paraphernalia to juveniles).

[5] It is perhaps possible that the burdens of proof assigned to the defendant in R.C. 2905.04 (child stealing), R.C. 2909.05 (criminal child enticement), and R.C. 2919.23 (interference with custody, first of two affirmative defenses) may be asserted to be improper if this Court rules

Other burdens of proof are assigned to Ohio defendants through the operation of R.C. 2901.05, and the judicial labeling of certain defenses as affirmative. Both self-defense and insanity have been termed such affirmative defenses.

A ruling that the State of Ohio must prove the absence of self-defense would appear to have no impact on the insanity defense. This Court has already concluded that insanity does not inevitably necessarily negate the mens rea element of crimes, by its holding in Leland v. Oregon, 343 U.S. 790 (1952), and its dismissal on the merits in Rivera v. Delaware, 429 U.S. 877 (1976). As insanity does not necessarily negate a mens rea element according to this Court's precedent, the State may clearly punish for the person's act, as their act

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for the Petitioner. However, these defenses present the issue of defense of another, not presented here, and the first two statutes also appear to provide a defense of another on mere grounds of assuring their welfare.

with the requisite mens rea is culpable, even if the person has a mental disease or defect.[6]

Recognition that self-defense does negate an element(s) would be consistent with this Court's precedent respecting insanity. The relationship of the insanity defense to the elements of crimes is fundamentally distinct from the relationship of self-defense to these elements. The act of the not guilty by reason of insanity acquittee is a crime. This Court so recognized in Jones v. United States, 463 U.S. 354, 634, 366 (opinion of the Court, Powell, J.), 380

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[6] Some states may choose to acquit on grounds of insanity, but that is essentially a privilege they bestow on the defendant, a separate issue which can be proven to their benefit. Other states may choose to in fact define their mens rea in a way that necessarily negates insanity. If they so define their mens rea element, then the burden of proof as to insanity cannot be placed on the defendant under this Court's precedent in Patterson. This Court has simply left to the States how they will define the mens rea, and has provided the input that the M'Naughten form of insanity will not inevitably and necessarily negate the mental element of crimes. Leland, at 800-801.

(dissenting opinion of Brennan, J.) (1983). It is not socially acceptable, and it is not in any sense lawful. Jones, at 367. The insane person's act is a crime, but society has excused him from the same stigma and from the form of punishment generally suffered by those who commit unlawful acts, due to the belief that he is not personally blameworthy. Jones, at 369 (opinion of the Court, Powell, J.), 373-374, n.4 (dissenting opinion of Brennan, J.). Therefore, most states provide for a special verdict of not guilty by reason of insanity; others may consider making the criminal behavior more clear by substituting a verdict of guilty but mentally ill. In any jurisdiction, if the act of the "insane criminal," Jones, at 362, were committed by a sane individual, society would certainly punish it as an unlawful act.

As to self-defense, however, the act

committed is socially acceptable, and it is lawful. See Brief of Petitioner, at 23-26 and Amicus Curiae Brief, at 23-32, 37-38, and n.1, infra. While an insanity acquittal is merely a reflection that an individual is not personally blameworthy, with self-defense the act itself is acceptable and not blameworthy. Sovereigns recognize this by providing an outright acquittal, not a conditional one.[7]

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[7] It is true that some foreign jurisdictions draw no such line between self-defense and insanity. The German practice, for instance, is to consider a tripartite structure for ordering all substantive issues relating to the defendant's guilt or innocence, including these two defenses. See Fletcher, supra, 77 Yale L.J., at 914. German judges require the prosecutor to prove (1) that the defendant brought about a result proscribed by the legislature, and (2) that the act was socially unacceptable (unjustified), and finally (3) that the actor was personally blameworthy (without excuse). Id., at 915-917.

While Professor Fletcher argues for adoption of the entire tripartite structure, this Court could readily and succinctly limit the State's obligations under the due process clause to the first two issues, and create no disturbance with its precedent. Indeed, this would also be

Further distinctions are the stigma, or lack thereof, borne by the defendant, and the consequences of a favorable verdict. "A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself." Jones, at 367, n.16. The insane individual's conditional acquittal may automatically result in an involuntary, indefinite commitment, Jones, see also, La Fave & Scott, Criminal Law (1986, 2d ed.), at Sec. 4.1, p. 304. An acquittal due to self-defense, however, is complete, carries no stigma, and no deprivation of liberty.[8]

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consistent with the Court's continuing reference to the constitutional limits on the State in defining crimes. If an issue, such as self-defense, has the lengthy and unwavering pedigree of being socially acceptable conduct, the State cannot legitimately exercise its police power to treat it as criminal, or to require the defendant to prove the issue. See generally Brief of Petitioner, at 24-31, Amicus Curiae Brief, at 4-14, and below.

[8] This distinction between self-defense and insanity is consistent with language recently used in McMillan v. Pennsylvania, at 2416, where this Court reinforced the proposition that neither Mullaney nor

A final distinction is the language utilized to describe the defenses. Courts and individuals commonly speak of the "right" to use force in self-defense (including the trial court below, see Joint App., at 21). No one speaks of a right to kill while insane.

The insanity defense and the defense of self-defense are thus so diametrically opposed that a ruling favoring Petitioner will not dilute the strength of this Court's previous cases relating to insanity. A thorough review of the possible impact on other defenses of a decision favorable to the Petitioner reveals the emptiness of the State's repeated reliance on an in terrorem effect. As self-defense necessarily negates one or more elements of the crime of aggravated murder, the burden of proof respecting it could not be shifted

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Patterson require a state to bear the burden on a defense that merely affects the degree of culpability or the severity of the punishment.

to the Petitioner Earline Martin under this Court's precedent.

II. WHEN A FACT ALTOGETHER EXCULPATES THE ACCUSED FROM ANY STIGMA AND PUNISHMENT, AND THE ACT IS HISTORICALLY RECOGNIZED BY ALL TO BE WHOLLY INNOCENT AND ABSENT OF CRIMINAL WRONGDOING, THEN THE STATE MUST BEAR THE BURDEN OF PROOF ON THAT ISSUE.

There are sound reasons for this Court to decline to provide the same level of flexibility to the States in allocating burdens of proof for wholly exculpating factors, as opposed to factors that merely affect the degree of culpability or severity of punishment. (The latter factors are those which result in conviction for a lesser offense, or in a special verdict indicating excused conduct, or possibly identifying a different form of punishment and assigning some level of stigma.) See Brief of Petitioner, at 20-23, 25-26, and Amicus Curiae Brief, at 57-63. Contrary to the State's assertions that Patterson dealt with factors which completely exculpate,

Brief of Respondent, at 24, all the Court had before it was an affirmative defense which reduced punishment, i.e., mitigated the offense. Similarly, in McMillan, the issue only related to sentencing, after a reliable guilt determination had been made. Thus, both Patterson and McMillan dealt with issues affecting the severity of punishment, not the issue of guilt or outright acquittal as to all crimes charged.

The issue of a separate test for wholly exculpating factors thus has not yet been resolved by this Court. Petitioner believes this case will test the Court's willingness to allow the presumption of innocence to be swallowed whole in the name of legislative flexibility. For if this Court carefully examines the State's claim for legislative flexibility here, it will find no fair and substantial basis for this allocation of the burden of proof.

The State has not argued, nor could it, that it has expanded the availability

of the defense to the benefit of the defendant. Compare Patterson, at 209, n.11. Ohio has defined self-defense in the same manner for over a century. See State v. Melchior, 56 Ohio St.2d 15, 20-21 (1978) (and cases cited therein). No greater or more ameliorative right to self-defense is provided than the minimal scope of the defense, as identified at common law. See Erwin v. State, 29 Ohio St. 186, 188-196 (1876) (adopting the views of English writers in defining the right). The State argues the general language of Patterson, at 209, that burdens may be allocated when the State concludes they are too cumbersome, too expensive, and too inaccurate. Brief of Respondent, at 28. However, there this Court was speaking to mitigating factors. Even if this Court applied such an approach to a wholly exculpatory factor of historical significance, it should at the least carefully examine the State's claim.

The State's only allegation as to cum-

bersomeness is a burden on the State in its case-in-chief, see Brief of Respondent, at 29-30. However, the defendant can certainly be obliged to bring forth some evidence of self-defense before an instruction will be provided. Ulster County Court v. Allen, 442 U.S. 140, 157-158, n.16 (1979). United States v. Bailey, 444 U.S. 394, 414-415, 417 (1980). This is the present practice in Ohio, see State v. Melchior, and removes the asserted cumbersomeness as the State need not present evidence negating self-defense until this is put in issue by their own evidence, or the defendant's case. Similarly, the State's assertion that the accused should bear the burden of proving self-defense because the accused is in a superior position to know of it and provide evidence, Brief of Respondent, at 11, is certainly a rational justification for requiring him to come forward with evidence, as the State at one point argued. See Brief of Respondent, at 13. But this

argument provides no support for placing the burden of proof on the defendant. See Mullaney, at 702, and Amicus Curiae Brief, at 16-17.

The State's last contention is the unsupported allegation of the threat of false claims of self-defense. Brief of Respondent, at 10-11. Even if one concedes the existence of a risk of false claims, there is no proffer from the State that shifting the burden of proof to it will result in any increase in false claims. Further, to the extent a choice is to be made between diminishing the risk of convicting an innocent person, and diminishing the risk of acquitting a guilty one, this country's system of justice has consistently chosen the former. Speiser v. Randall 357 U.S. 513, 525-526 (1958), and In Re Winship, 397 U.S. 358, 370-372 (Harlan, J., concurring).

Lastly, other measures more than adequately protect against false claims and the alleged societal harm of acquitting the

guilty. False claims are countered by a requirement that the defendant come forward with some evidence, by the threat of a perjury prosecution, and by impeachment. The State can permissibly use the defendant's prearrest silence, or his failure to provide exculpatory information to the police prior to the administration of **Miranda** warnings, for impeachment and in closing argument. **Jenkins v. Anderson**, 447 U.S. 231 (1980), **Fletcher v. Weir**, 455 U.S. 603 (1982). To avoid surprise the prosecution could also seek adoption of a rule requiring a notice of intent to rely on self-defense, see **Williams v. Florida**, 399 U.S. 78 (1970), or simply seek a sequestration of defense witnesses, or a continuance. This Court has also approved other deterrents to defendant perjury, by permitting the defense counsel to threaten to disclose his client's intended perjury, **Nix v. Whiteside**, ___ U.S. ___, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and by permitting the

trial judge to consider the presentation of false testimony in sentencing the defendant, United States v. Grayson, 438 U.S. 41 (1978). Finally, the trier of fact will be instructed to apply the same standards of credibility that they do respecting other evidence, and the interest or bias of defense witnesses will be properly considered. See e.g., Joint App., at 9, and Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986).

Petitioner not only disputes the State's assertion that the "elements" of self-defense are "subjective," Brief of Respondent, at 13, but questions its relevance. The facts relevant to self-defense are no more subjective, and probably far less so, than the mens rea elements of homicide or the absence of accident. Yet the prosecution proves these elements. Self-defense is based on objective criteria, and on evidence of a type commonly presented to, and evaluated, by juries.[9]

In short, the State's claims for flexibility do not withstand the careful examination this Court should employ when the burden of proof as to a wholly exculpatory defense is at issue.

III. THE STATE HAS EXCEEDED THE CONSTITUTIONAL LIMITS IN DEFINING ITS CRIMES, AS SELF-DEFENSE IS A CONSTITUTIONALLY PROTECTED RIGHT, OR CONDUCT FOR WHICH A DEFENDANT CANNOT CONSTITUTIONALLY BE PUNISHED.

The State makes much of its need for flexibility, but a claim for legislative flexibility is simply illegitimate in the context of this case. In Patterson, this Court expressed its concern that if Mullaney is read too broadly, its "practical effect . . . might be to undermine legislative reform of our criminal justice system." Patterson, at 214, n.15. States

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[9] Here again, self-defense differs from insanity. While this Court has recognized the difficulties and uncertainties associated with psychiatric testimony, Addington v. Texas, 441 U.S. 418, 430 (1979), self-defense cases are not dependent on such testimony.

might be put "to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict for a crime which otherwise is within its constitutional powers to sanction by appropriate punishment." Id., at 208.

The State is not presented with such a choice here, as the State has no constitutional power to criminalize or punish an act of self-defense. While in Patterson it was not disputed the State may constitutionally criminalize and punish Patterson's act of unjustified homicide, there is most certainly a dispute in this case. This case not only tests the "constitutional limits beyond which the States may not go in defining crimes," Patterson, at 210, but clearly demonstrates that the State of Ohio has exceeded those limits.

A. Self-Defense Is A Fundamental Right.

The State apparently does not dispute

that the right to act in self-defense is universally accepted in this country today. See Brief of Respondent, at 32. Rather, the State argues that as the right has never been recognized as a fundamental right, it creates no limitation on the State's definition of offenses. Id. This argument truly begs the question presented to this Court. The issue will not be raised unless a State has acted to infringe this right, and only two States, Ohio and South Carolina, have acted to allocate the burden as to self-defense so as to raise the issue. See Amicus Curiae Brief, at A-4 to A-12. In the Petitioner's view, it is far more significant that no courts have ruled to the contrary.[10]

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[10] The Ohio courts below were presented with this issue, but only the dissenting justices reached the question. See Joint Appendix, at 35, 43-45. Nor has the Sixth Circuit rejected the existence of this right when it was presented in Ohio cases. That Court has simply refused to consider the issue, or its relevance to allocation of the burden of proof to Ohio defendants. In White v.Arn, 788 F.2d 338, 347, n.15,

Indeed, if this Court were to accept the State's contention that self-defense is not a fundamental right, Brief of Respondent, at 32, and that the federal constitution permits the State to punish one who acted in self-defense, its decision would likely shock our citizens. "[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear" and "would shock the moral sense of any civilized community". Holmes, The Common Law, at 49-50. See also Brief of

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(6th Cir. 1986), the court "decline[d] to dispose of this case on a novel, unaccepted theory," and limited itself to the Patterson elements analysis, while stating its holding did "not reject the notion that a defendant has a limited right to act in self defense under certain circumstances." As South Carolina is the only other state apparently attempting to allocate this burden to the accused, the issue could be expected to be raised there. It was presented in Griffin v. Martin, 785 F.2d 1172, 1192-1193 (4th Cir. 1986), but the decisive concurring judge found it unnecessary to reach the issue. The panel opinions were recently withdrawn, due to an equally divided court on rehearing en banc, 795 F.2d 22 (4th Cir. 1986).

Petitioner, at 24-30, and Amicus Curiae Brief, at 4-14.

The ancient roots of the right of self-defense are to be found in those documents traditionally consulted by this Court. Review of Judeo-Christian teachings, common law treatises, colonial charters and state constitutions, as well as contemporary domestic and foreign laws all confirm the fundamental nature of the right to self-defense.

References to killing in self-defense in the Bible and the Talmud consistently recognize the act as being without blame; some passages reflect what appears to be a positive duty to act in self-defense. See Appendix, at RA-1. The English common law recognized the right of self-defense and of acquittal. See Appendix, at RA-1. The right to self-defense, with the right to community defense or defense of others, was promptly adopted in the colonial charters

of New World settlements. See Appendix, at RA-2. As the states wrote their first constitutions, the right to "the enjoyment of life and liberty, with the means of . . . pursuing and obtaining happiness and safety" was guaranteed, and identified as "[an] inherent right, which when [men] enter into a state of society, they cannot, by any compact, deprive or divest their posterity." Constitution of Virginia, June 12, 1776. Sources of Our Liberties, at 311 (emphasis added). The Constitution of Pennsylvania, August 16, 1776, included as one of the "natural rights of men," "enjoying and defending life and liberty." Sources, at 328, 329 (emphasis added). See also Appendix, at RA-3.

Present state constitutions further establish the right to defend oneself as fundamental. State constitutional provisions formally recognizing a constitutional right to act in self-defense exist in

thirty-two states. See Appendix, at RA-3-9. These provisions take one of two forms, either identifying defending life as a natural right, or linking the citizen's right to bear arms to a right to act in defense of himself. Id.

Recognition of the right to act in self-defense is also given in a number of international documents, including the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and in the criminal codes of many sovereign nations. See Appendix, at RA-9 for texts. Indeed, Petitioner can find no evidence of any sovereign even attempting to criminalize or punish such conduct. Further recognition of the right is found in international law. See Appendix, at RA-10.

In the face of such unanimous authority, there can be no doubt of the fundamental nature of the right of self-defense.

This right rests within the very bedrock of our traditional system of justice, and to criminalize such conduct would surely shock the conscience of our people.

B. As Self-Defense Cannot Be Criminalized Or Is A Fundamental Right, To Convict The Petitioner The State Must Bear The Burden Of Proving Beyond A Reasonable Doubt That The Petitioner Was Not Acting In Self-Defense.

1. This Court's Precedent Respecting Allocation Of The Burden Of Proof Demands That The State Bear This Burden.

This Court has repeatedly stated that there are constitutional limits to the State's power of defining crimes and prescribing penalties. McMillan, at 2417, citing Patterson, at 210. The State of Ohio has clearly exceeded those limits by refusing to acknowlege that self-defense negates an element of Ohio crimes, or at the least to admit that Ohio statutes must be so construed. The ultimate and inevitable result of so defining the crime is that Ohio defendants will be punished (in this case with life imprisonment, Joint

App., at 1) when it is as likely as not that they are exercising their fundamental right of self-defense, and engaging in lawful conduct.

This Court recently stated that "in certain limited circumstances Winship's reasonable doubt requirement applies to facts not formally identified as elements of the offense charged." McMillan, at 2417. There can be no question that one of those limited circumstances arises when the State fails to apply the Winship reasonable doubt requirement to constitutionally necessary facts, i.e., facts without which a criminal statute will deny constitutional rights by sweeping too broadly into areas of protected freedom.

The State's single sentence response to this issue is that this Court "need not determine whether self-defense is a constitutionally protected right, since Ohio recognizes that justification for otherwise illegal conduct." Brief of Respondent, at

32. If this Court concludes the State is correct in its assessment, then there are in fact no constitutional limits on the State's allocation of the burdens of proof. The State could evade all constitutional questions in the overbreadth of its statutes by simply shifting the burden of proof as to those facts to the defendant. Not only would such a ruling from this Court invite significant intrusions on personal liberties by legislatures and courts, but it would cheapen the reasonable doubt standard to the point where it becomes an ancient relic, an empty promise of fairness and certitude in our criminal justice system.

There is simply no support for the State's position that it can shift the burden of proof as to constitutionally necessary elements.

When this Court has found that criminal statutes infringed on constitutional rights of the accused, its remedy has been

to require the State to limit the statute's scope. See e.g., Talley v. California, 362 U.S. 60, 64-65 (majority opinion), and 66 (Harlan, J., concurring) (1960); Griswold v. Connecticut, 381 U.S. 479, 507 (White, J., concurring in judgment) (1965); Lambert v. California, 355 U.S. 225, 227 (1957). This Court has then uniformly required the State to bear the burden of proving these constitutionally necessary facts. See e.g., Healy v. James, 408 U.S. 169, 186 (1972) (citing cases); Lambert, at 229; Powell v. Texas, 392 U.S. 514, 544 (Black, J., with Harlan, J., concurring) (1968). See also Freedman v. Maryland, 380 U.S. 51, 58-60 (1965).

Indeed, the strongest case denouncing the State's argument is one of those most frequently cited when discussing these constitutional limitations: Speiser v. Randall, 357 U.S. 513 (1958), cited with approval, Patterson, at 201-202, and McMillan, at 2416. In Speiser, this Court

struck down California legislation which required that a taxpayer seeking a tax exemption prove he had not advocated the overthrow of the government. This Court concluded that to avoid a discriminatory denial of a tax exemption, due process required the State bear the burden of proving the taxpayers engaged in criminal speech.

When this Court has required such a burden be borne by the State before it could deny a tax exemption, it is surely inappropriate for the Respondent to assert that the State must be relieved of such a burden in an aggravated murder case with life imprisonment in the balance.[11]

The State of Ohio has far exceeded the constitutional limits in defining the crime

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[11] Even in contexts other than the proof of crimes, this Court has required the State prove the absence of intrusion on constitutional rights, although the Court may permit a mere preponderance showing. See e.g., Doe v. U.S. 465 U.S. 605, 614, n.16 (1984) [government must make a showing

of aggravated murder, and under this Court's precedent, that demands a reversal.

2. Even If A Different Analysis Is Utilized, At A Minimum The State Would Be Required To Prove A Compelling State Interest to Justify Burdening The Petitioner's Right. The State Has Not Proven Such A Compelling State Interest.

Even if this Court were to consider significantly altering its present approach to the constitutional limits on the State's defining of crimes [an alteration which will likely invite wholesale intrusions on other rights in a similar manner], it would be totally inappropriate to do so in the absence of any compelling state interest. This Court has required that the State demonstrate a compelling state interest before it can infringe on protected rights,

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that complying with subpoena duces tecum will not deny Fifth Amendment privilege]; **Lego v. Twomey**, 404 U.S. 477 (1972) [government must prove confession was voluntary]. Earline Martin did not even receive that degree of respect for her rights. She was convicted when it was as likely as not that she had acted in exercise of her constitutional rights.

and Ohio must do so if it is to literally burden the constitutional rights of Earline Martin. Shelton v. Tucker, 364 U.S. 479, 488 (1960). The State has utterly failed to make such a compelling showing here.

No compelling need exists to burden the defendant in exercising this right as opposed to others. The State's unsupported allegations of the threat of false claims of self-defense can be effectively dealt with by other measures. See Argument II, above. To the extent a choice must be made between diminishing the risk of convicting an innocent person, and diminishing the risk of acquitting a guilty one, this country's system of justice has consistently chosen the former. Speiser, at 525-526, and Winship, at 370-372 (Harlan, J., concurring).

The State's argument that this Court should refrain from identifying self-defense as a fundamental right, or as conduct that cannot constitutionally be punished,

as this would require the Court to provide a "uniform definition for self-defense," Brief of Respondent, at 32, is also unavailing. This Court has not found it necessary to define intent, **mens rea**, or act, although it has restrained the states in punishing in the absence of these facts. See **Lambert**, **Powell**. Further, the issue is simply not present here. The Ohio definition of self-defense is the minimal common law test, and identifies an act which for centuries has not been deserving of punishment. This issue, unlike insanity, rests on objective facts that have maintained their essential structure for aeons. To argue that the right should not be recognized as the task will be too difficult is simply inaccurate, and proves too much. Under the State's view, this Court should simply refrain from considering issues of fundamental fairness to ease its workload. Petitioner believes that the citizens of this country deserve more protection than

that view accords them.

The State's contention that it will be unable to prosecute is also belied by the fact that all but two states require the prosecution to bear this burden of proof. Brief of Amicus Curiae, at A-4 to A-12. The State correctly asserts that the fact that other jursdictions have chosen to assume this burden does not, in and of itself, require the burden be assumed by other states, Brief of Respondent, at 29, citing Patterson, at 211. However, here the Court is presented with impermissible criminalizing, or impermissible burdening of a constitutional right. The fact that an overwhelming number of jurisdictions[12] have not found it necessary to so burden the right surely disputes the State's claim

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[12] See also Appendix, at RA-11 for references to a sampling of foreign jurisdictions placing the burden of proof on the prosecution to prove the absence of self-defense beyond a reasonble doubt.

of a compelling state interest. See e.g., Ballew v. Georgia, 435 U.S. 223, 244 (1978).

This Court's precedent requires the State bear the burden of proving the Petitioner did not act in self-defense, as the State cannot criminalize such conduct. Even if a different approach is used, and the State's asserted purpose is deemed legitimate, it is clear that less drastic means are available to the State to achieve their asserted purpose. The State violated the Consititution by placing the burden of proof respecting self-defense on the Petitioner.

Its practice needlessly and significantly increased the risk of convicting a wholly innocent individual.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Briefs of Petitioner and Amici, the Petitioner's conviction should be reversed by this Court.

Respectfully submitted,

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APPENDIX

A P P E N D I X

"ANCIENT ROOTS" OF THE RIGHT OF SELF-DEFENSE

Judeo-Christian Teachings

Exodus XXII, 1: "If a thief be found breaking in, and be smitten so that he dieth, there shall be no blood-guiltiness for him." [Interpreted as] "The following must be saved [from sinning] even at the cost of their lives: he who pursues after his neighbor to slay him." The Babylonian Talmud, Sanhedrin (72a. 72b, and 73a), (emphasis added) and Berakoth (62b) ["And the Torah has said, If one comes to kill you, rise and kill him first," "stand not idly by, but save [the assailant] from committing such a great sin [by slaying him]."]

English Common Law

Perkins on Criminal Law, 2nd ed., 1969, at 1001: [The English common law recognized an act done in self-defense was to be treated differently than a criminal homicide, and was either justifiable (meriting acquittal), or excusable (meriting only a forfeiture of goods and custody until a pardon was received).]

24 Henry VIII, c.5 (1532) [Full text appears at Perkins, at 998, and n.30] This statute [said by Hale to be "declarative" of the common law, Id.] provided that those who acted in self defense were to be "fully acquitted and discharged."

Colonial Charters and Statutes

[All page references are to Perry, Sources of Our Liberties, 1978)]

The First Charter of Virginia, April 10, 1606: provided that the colonists shall "from time to time, and at all times forever hereafter, for their several Defences, encounter, expulse, repel, and resist . . . every person . . . that shall enterprise or attempt . . . the Hurt, Detriment or Annoyance, of the said several Colonies." [At 43.] See also The Charter of the Massachusetts Bay [at 94].

The Massachusetts Body of Liberties (December 10, 1641):

The Liberties of Women, No. 80: "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assalt." [At 156] (emphasis added).

When defining murder, Capital Laws, section 4, (referring to the Scriptures): "If any person committ any wilfull murther, which is manslaughter, committed upon premeditated mallice, hatred, or Crueltie, not in a mans necessarie and just defence, nor by meere casualtie against his will, he shall be put to death." [At 94.]

[There appears to be little other reference to self-defense in the recitation of liberties enjoyed of colonists, most likely as the right to self-defense was so inherent in the nature of colonial living that it was deemed unnecessary, and as the colonists consistently claimed the rights of Englishmen which included the right of self-defense. See e.g., Charter of Maryland [at 109].]

Early State Constitutions

Those first state constitutions which paralleled the phrasing of the Pennsylvania Constitution, in providing the right to enjoy and defend life [page cites are to Sources of Our Liberties]:

The Constitution of Vermont (July 8, 1777) [at 364].

The Constitution of Massachusetts (October 25, 1780) [at 374].

The Constitution of New Hampshire (June 2, 1784) [at 382].

Present State Constitutions

State Constitutions Identifying Self-Defense As A Natural And Inalienable Right:

Massachusetts Const. Art I: All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; . . . Mass. Const. Part I, Art. I (emphasis added).

California: All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty . . . and pursuing and obtaining safety . . . Cal. Const. Art. I, Section 1 (emphasis added).

Delaware: Through Divine goodness, all men have by nature the rights of . . . defending life and liberty . . . as these rights are essential to their welfare, for due exercise thereof, power is inherent in them . . . Del. Const., Preamble (emphasis added).

Iowa: All men are, by nature, free and equal, and have certain inalienable rights -- among which are those of enjoying and defending life and liberty . . . and pursuing and obtaining safety and happiness. Iowa Const. Art. I, Section 1 (emphasis added).

New Hampshire: All men have certain natural, essential, and inherent rights -- among which are, the enjoying and defending life and liberty; . . . N.H. Const. Pt. I, Art. 2 (emphasis added).

New Jersey: All persons are by nature free and independent, and have certain natural and unalienable rights, among which are, those of enjoying and defending life and liberty . . . and of pursuing an obtaining safety . . . N.J. Const. Art. I, Section 1 (emphasis added).

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; . . . pursuing and obtaining safety and happiness. N.D. Const. Art. I, Section 1 (1984) (emphasis added).

Ohio: All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life . . . and obtaining . . . safety. Ohio Const. Art. I, Section 1 (emphasis added).

West Virginia: All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or a divert their posterity, namely: the enjoyment of life and liberty . . . and of pursuing and

obtaining . . . safety. W. Va. Const. Art. 3, Section 1 (emphasis added).

State Constitutions Linking An Individual Citizen's Right To Bear Arms To A Right To Act In Defense Of Self:

- Alabama: That every citizen has a right to bear arms in defense of himself and the state. Ala. Const. Art. I, Section 26 (emphasis added).

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Ariz. Const. Art. II, Section 26 (emphasis added).

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. Colo. Const. Art. II, Section 13 (emphasis added).

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Conn. Const. Art. I, Section 15 (emphasis added).

Florida: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. Fla. Const. Art. I, Section 8 (emphasis added).

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. Ind. Const. Art. I, Section 322 (emphasis added).

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. Kan. Const. Bill of Rights, Section 34 (emphasis added.).

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons. Ky. Const. Section 1 (emphasis added).

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. Mich. Const. Art. I, Section 6 (emphasis added).

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Miss. Const. Art. III, Section 12.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. Mo. Const. Art. I, Section 23 (emphasis

added).

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Mont. Const. Art. II, Section 12 (emphasis added).

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. N. M. Const. Art. II, Section 6 (emphasis added).

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. Ohio Const. Art. I, Section 4 (emphasis added).

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. Okla. Const. Art. II, Section 26 (emphasis added).

Oregon: The people shall have the right to bear arms in defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. Or. Const. Art. I, Section 27 (emphasis added).

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. Pa. Const. Art. I, Section 21 (emphasis added).

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S. D. Const. Art. VI, Section 24 (emphasis added).

Texas: Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. Tex. Const. Art. I, Section 23 (emphasis added).

Utah: The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law. Utah Const. Art. I, Section 6 (emphasis added).

Vermont: That the people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. Vt. Const. Ch. 1, Art. 16 (emphasis added).

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men. Wash. Const. Art. I, Section 24 (emphasis added).

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. Wyo. Const. Art. I, Section 24 (emphasis added).

Declarations and Conventions:

The Universal Declaration of Human Rights: Article 3. Everyone has the right to life, liberty and security of person." General Assembly Resolution 217 A (III), November 10, 1948, Official Records III.1, Resolutions (A/810), p. 71.

The Convention for the Protection of Human Rights and Fundamental Freedoms: Article 2. (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is not more than absolutely necessary -- (a) in defense of any person from unlawful violence; . . ." (Rome, November 4, 1950), 213 U.N.T.S. 221: European Treaties Series No. 5.

Foreign Criminal Codes:

Criminal Code of the USSR: Article 13 of the CL Fundamentals, and the Decision of the Plenum of the USSR Supreme Court of December 4, 1969, "Practice of courts in the application of legislation on necessary defenses": [The latter speaks of the "indefeasible right of the citizens for defense." Soviet law requires "social danger" as the main characteristic of a crime. The USSR "stipulates two circumstances which exclude social danger of an action, and whose presence negates crimin-

ality even if the action results in harmful consequences. They are self-defense (also called necessary defense) and necessity!" Bassuiouni and Savitski, eds., The Criminal Justice System of the USSR (1979), at 157-158.]

A Sampling Of Criminal Codes Recognizing There Is No Offense When An Act Is Done In Self-Defense:

[As identified in the American Series of Foreign Penal Codes].

Austrian Penal Code, Sec. 1
Canadian Criminal Code, Secs. 34-37
Danish Criminal Code, Chap. III, Sec. 13(1)
French Penal Code, Arts. 64, 328 & 329
German Penal Code, Sec. 53
Greenland Criminal Code, Sec. 5
Japanese Draft Penal Code, Arts. 13, 14
Korean Criminal Code, Arts. 12, 21
People's Republic of China Criminal Code, Art. 17
Norwegian Penal Code, Secs. 47, 48
Polish Penal Code, Arts. 1, 22
Romanian Penal Code, Art. 44
Swedish Penal Code, Chap. 24. Sec. 1
Swiss Penal Code, Art. 33
Turkish Criminal Code, Sec. 49

International Law Recognition of the Right of Nations to Act in Self-Defense:

The Charter of the United Nations: Article 51, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense."

A Sampling Of Foreign Authorities Placing The Burden Of Proof On The Prosecution To Prove The Absence Of Self-Defense:

Adenaes, The General Part of The Criminal Law of Norway (1965), at 94-95.

Howard, Australian Criminal Law (1965), at 20.

Golzuklu, Turkish Code of Criminal Procedure of 1929 (1962), at 6.

Japanese Draft Penal Code, Art. 13, 14.

Yadin, Israel Criminal Procedure (1967), at 142.

Mulder (1978) 40 C.C.C. (2d) 1 (Ont. C.A.) (Canada).

Chan Kau v. The Queen, [1955] A.C. 206 (England).

Decision of the Plenum of the USSR Supreme Court of December 4, 1969, "Practice of courts in the application of legislation on necessary defenses".